Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

ROBERTO VALERA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

THE APPELLATE COURT ERRED IN DENYING PETITIONER'S TITLE 28 U.S.C. § 2255 MOTION WITHOUT REQUIRING AN EVIDENTIARY HEARING BECAUSE THE CONTROVERTED FACTUAL ISSUES WERE NOT DETERMINED BY THE MOTION ITSELF, BY THE RECORDS, OR BY THE DISTRICT JUDGE'S PERSONAL KNOWLEDGE OR RECOLLECTION, INASMUCH AS HE WAS NOT THE TRIAL JUDGE, BUT THE SENTENCING JUDGE.

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OPINIONS BELOW

The United States District Court for the Middle District of Florida denied Petitioner's habeas corpus petition without making findings of fact or conclusions of law on December 28, 1992. The non-published opinion of the Court of Appeals for the Eleventh Circuit affirming the Judgment and entered on November 22, 1993 as No. 93-2184, is reproduced in the Appendix at page 2. The Order denying Rehearing was entered on January 10, 1994 and is reproduced in the Appendix at page 8.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on November 22, 1993. A timely Petition for Rehearing was filed and the Order of the Court of Appeals denying the Petition for Rehearing was entered on January 10, 1994. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 28 U.S.C. § 2255 which reads in its pertinent part as follows:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determining the issues and make findings of fact and conclusions of law with respect thereto.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS IN THE COURT BELOW

The Petitioner, Roberto Valera ("Valera"), was indicted with other named and unnamed defendants by an Orlando, Florida Grand Jury under a superseding fourteen count indictment on May 16, 1986, in violation of Title 18 U.S.C. § 1962, R.I.C.O. and R.I.C.O. conspiracy; Title 18 U.S.C. § 1952 and § 2, Travel Act.

On February 6, 1987, following a jury trial, Valera was convicted on four counts, including the RICO charges. On May 19, 1987, Valera was sentenced to thirty years imprisonment and $50,000 fine.

Valera timely appealed his conviction and sentence which were affirmed. *United States v. Valera*, 845 F.2d 923 (11th Cir.1988). Subsequently, Valera filed for a *Writ of Certiorari* to the Supreme Court of the United States, which was denied May 8, 1989, 490 U.S. 1046, 104 L.Ed.2d 422, 109 S.Ct. 1953.

On December 4, 1992, Valera filed a formal pro se Title 28 U.S.C. § 2255 motion to vacate and set aside his conviction and sentence. The government on its own volition filed a response to said motion thirteen days later. Eleven days later the district court denied the motion without requiring the government to respond to same, without an evidentiary hearing, and without making findings of fact or conclusions of law.

Valera timely appealed the district court's denial of his section 2255 motion which was affirmed in an unpublished opinion on November 22, 1993. No. 93-2184.

His petition for a rehearing was denied on January 10, 1994.

Valera remains serving his thirty year sentence and is presently incarcerated by the Federal Bureau of Prisons at Tallahassee, Florida.

B. STATEMENT OF THE FACTS

Valera's complete criminal case was based on the testimony of three government witnesses, involving government corruption and drug offenses committed almost five years prior to the time of his indictment. Had the Court granted Valera an evidentiary hearing, the following would have been demonstrated:

The facts giving rise to Valera's constitutional claims relate to a specific part of the testimony of one of the government's chief witnesses, Joseph Crawford ("Crawford") against Valera, and the failure of his defense counsel, Bill Clay ("Clay"), and the trial court to recall Crawford to the witness stand, after Crawford recanted previously stated testimony admitting perjury to Clay.

Crawford was the criminal enterprise's pilot and played a significant role in the racketeering enterprise whose success was dependent upon a corrupt United States government agent, Scott McKenney ("McKenney"). Ultimately, McKenney would be succeeded by another corrupt government agent, DEA Special Agent Michael Wong ("Wong"), who later became the chief investigator in Valera's criminal case.

The evidence which Valera will present, if granted an evidentiary hearing, is that when things got too hot for

the corrupt customs agent, McKenney, before he resigned from his position with the U.S. government and removed himself from active participation in the criminal enterprise, he arranged for a replacement of another corrupt government agent. At a meeting held in McKenney's U.S. Customs office, he introduced Wong, an Oriental-American government agent, to co-conspirator Crawford, as the person who would replace McKenney in the criminal enterprise.

On February 2, 1987, the government's chief witness, Crawford, testified in Valera's trial, inculpating Valera and others, and bolstering the testimony of McKenney, a United States Customs Agent, who had turned "drug dealer," "smuggler," and who then turned "informant" for the United States Government for leniency in return for testifying against Valera. Said testimony, Valera contends, was perjured, and the government knew it was perjured.

Crawford, on the evening following his testimony in Valera's trial, telephoned Valera's counsel, Clay, at his hotel room, to inform him that his testimony given in the trial proceedings, particularly relating to government agent Wong's involvement within the RICO enterprise, wherein Crawford failed to identify Wong as the corrupt government agent introduced to him by corrupt customs agent McKenney, was patently false, and that said testimony was elicited by the government prosecutor, Paul Moriarty ("Moriarty"), by means of intimidation, coercion, and threats to Crawford if he did not testify as he was told by Moriarty. App. 24-25.

Crawford, albeit hesitantly recanted to Clay as to his desire to be recalled to the witness stand to correct and change his testimony, wherein he had falsely testified to the jury concerning chief investigator Wong's involvement within the enterprise.

Clay, faced with the problem presented by Crawford's desire to recant his perjured testimony, in the early morning hours of February 5, 1987, to wit, at approximately 1:00 a.m., after Crawford's telephone call, and after having argued with Valera (Valera wanted to recall Crawford, Clay did not) consulted with an attorney in Miami, Florida, who Clay referred to as "an expert in the field of rendering advice on ethical questions to lawyers." App. A-13.

The record shows that the day following Crawford's telephone call desiring to recant his testimony, Clay addressed the Court regarding the contact made with him by Crawford.[1] App. at A-11 to A-19.

Clay presented to the Court essentially that (1) a government witness, Crawford, had expressed his desire to correct his untruthful testimony of the previous day, specifically testimony concerning Agent Wong; (2) that he, Clay, sought legal advice from an expert in the field of ethics; (3) that he had discussed the issue with co-counsel George Tragos ("Tragos"), and defendant Valera, and had reached the conclusion that he did not want to recall Crawford because "we do not want the jury to have any

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[1] It should be noted that Clay's disclosure was not in front of Judge Sharp, who was Valera's sentencing judge and who denied his § 2255 motion without a hearing.

thought that we are in any way vouching for his credibility." App. A-18, and (4) his fear that "Crawford could be trying to work some type of obstruction of justice and fabrication of evidence against me [Clay]." App. A-14.

Despite the apparent fact that a key government witness, who had implicated Valera in the RICO conspiracy, and had indicated a desire to recant and correct crucial false testimony, neither Valera's counsel, nor the government, nor the Court sought to recall the witness to the stand. App. A-11 to A-19.

Valera will demonstrate that reposed in his counsel, Clay, was an actual conflict of interest which prevented him from recalling Crawford, to wit, that Clay had been surreptitiously coaching Crawford for eight months prior to trial without the prosecutor's, or the Court's knowledge.[2] Although not illegal per se, it was highly unethical. Clay became afraid of Crawford's testimony, if recalled, concerning his coaching and interviewing, "that Mr. Crawford had some ulterior motive in mind with regard to me and he was out doing his own little mission for his own ulterior motive." App. A-18.

Crawford persisted in his desire to correct his perjurious testimony and on the 18th day of November, 1991, unsolicited and voluntarily executed an affidavit for the Court's benefit, wherein he alleged that the government

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[2] Clay never disclosed to the Court his interviews of Crawford, instead he made it seem like he had never heard of him until the trial, and could not understand why Crawford would be calling him to recant his testimony.

knew his testimony concerning Agent Wong was perjurious, and the government solicited same through intimidation, coercion and threats. App. A-20.

Valera will show that although in the within circumstances he is not required to demonstrate tha. his representation was adversely affected as a result of the conflict herein identified, his representation was in fact adversely affected thereby.

Valera will demonstrate that his counsel was burdened by actual conflicts of interests before, during and after his criminal trial proceedings which deprived him of the assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution.

Valera will further demonstrate that the government not only permitted the introduction of perjured testimony by one of its chief witnesses, but solicited said testimony constituting prosecutorial misconduct so flagrant as to deprive Valera of his right to due process to said constitution, entitling Valera to a new trial.

ARGUMENT

THE APPELLATE COURT ERRED IN DENYING PETITIONER'S TITLE 28 U.S.C. § 2255 MOTION WITHOUT REQUIRING AN EVIDENTIARY HEARING BECAUSE THE CONTROVERTED FACTUAL ISSUES WERE NOT DETERMINED BY THE MOTION ITSELF, BY THE RECORDS, OR BY THE DISTRICT JUDGE'S PERSONAL KNOWLEDGE OR RECOLLECTION, INASMUCH AS HE WAS NOT THE TRIAL JUDGE, BUT THE SENTENCING JUDGE

This Court's decision in *Machibroda v. United States*, 368 U.S. 487, 7 L.Ed.2d 473, 82 S.Ct. 510 (1962), sets the precedent as to the proper interpretation of Title 28 U.S.C. § 2255 as to the duty of the district courts to provide evidentiary hearings:

> There can be no doubt that, if the allegations contained in the Petitioner's motion and affidavit are true, he is entitled to have his sentence vacated.

Machibroda, supra, 368 U.S. at 493.

The Petitioner, Valera, urges that his section 2255 motion, and subsequent appellate brief adequately present his issues and are appropriate for collateral review without change or correction. This Honorable Court is aware that defendants are not required to try their cases by their pleadings and that facts alleged by defendants in section 2255 motions are to be presumed by the district court as true for the purpose of the court's determination as to whether an evidentiary hearing is required. *Townsend v. Sain*, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (1963). Although this Court has said that the sentencing

court has discretion to ascertain whether a claim is substantial before granting a full evidentiary hearing under a section 2255 motion, it has also ruled that unless the allegations are vague, conclusory, or palpably incredible, a hearing is required, where controverted factual issues are not determined by the motion itself, by the trial court's files and records, or by the district judge's personal knowledge or recollection:

> The statute requires a District Court to "grant a prompt hearing" when such a motion is filed, and to "determine the issues and make findings of fact and conclusions of law with respect thereto" unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."
>
> The factual allegations . . . related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection.

Machibroda, supra, 368 U.S. at 494.

In the case at bar, the Court of Appeals erred in finding that, "the material facts underlying Valera's two issues have been adequately developed and demonstrated that Valera is not entitled to § 2255 relief." App. A-3. Valera points out that due to the conflict which he alleges his counsel was confronted with, and which is emphasized in his § 2255 motion and subsequent appeal, a full hearing was not had for the development of this conflict. Further, the conflict was not candidly presented to the trial court, and the district judge who denied

Valera's § 2255 motion, without requiring the government to respond, and without an evidentiary hearing, was not the trial judge, and thus was prevented from reliably making findings from personal knowledge or recollection of the relevant facts in which Valera's § 2255 motion was based.

It has been clear, since the decision by this Court in *Glasser v. United States*, 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 (1942) that a criminal defense attorney's conflict of interest may rise to the level of constitutional ineffectiveness:

> [T]he assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by . . . one lawyer simultaneously representing conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

This Court in *Satterwhite v. Texas*, 486 U.S. 249, 100 L.Ed.2d 287, 108 S.Ct. 1792 (1988) stated:

> Some constitutional violations by their very nature cast so much doubt on the fairness of the trial process that as a matter of law they can never be considered harmless; violations of the federal Constitution's Sixth Amendment that pervade the entire proceedings such as a violation of the accused's right to conflict free representation fall within this category.

Satterwhite, supra, 486 U.S. at 256.

In *Holloway v. Arkansas*, 435 U.S. 475, 55 L.Ed.2d 426, 98 S.Ct. 1173 (1978), this Court reasoned, "the presence of

a conflict makes the existence of prejudice to the defendant (and, conversely, the existence of harmless error) virtually impossible to ascertain since:

> It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of conflict on the attorney's representation of a client. And to assess the impact of a conflict of interest on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases unguided speculation.

Holloway, supra, 435 U.S. at 491-92.

Valera's § 2255 motion is partly based on a hearing that took place during his trial, wherein his counsel disclosed that a government witness, who he had been surreptitiously coaching, and who had called him desiring to recant his alleged perjurious testimony given at Valera's trial, was not recalled to the witness stand.

The day after government witness Crawford testified in Valera's trial, he called Valera's counsel at his hotel room desiring to recant a crucial testimony, concerning the alleged corruption of the DEA chief investigator in Valera's criminal case:

> Mr. Clay: Your Honor, may I address the Court . . . I believe that I should make a disclosure to the court and the government. . . .

> At approximately 10:00 o'clock last night I received a phone call from a government witness, Joseph Crawford. Crawford told me he was calling me because he was uncomfortable with something he had testified about in the case . . . Basically, the person that McKenney was grooming to take over McKenney's corruption et cetera.
>
> . . . He told me he [Crawford] didn't feel that what he told the jury was accurate.
>
> . . . He might have left a false impression in the jury's mind [illegible] to my questions and the government's.

App. A-11-12.

It is emphasized that the meetings between Valera's counsel and the government witness, encompassing a period of several months, where the government admits were "unbeknownst" to it, are events which can be described by testimony to be offered at an evidentiary hearing, all occurred outside the courtroom. There are others, e.g., the telephone call from Crawford to counsel Clay, and other conversations; the affidavit Crawford submitted and others. It is further pointed out that the district judge, Sharp, who summarily denied Valera's motion, by stamping a copy of the cover page of said motion, without issuing an order, nor opinion, was not the same judge who presided over Valera's trial, (only at his sentencing) and therefore could not possibly rely on his recollection of the disclosure hearing by Clay. App. A-1.

Valera contends that his counsel, Clay's refusal to recall Crawford to the witness stand in order to recant his perjurious testimony, and to be able to expose the government's manipulations and coercions of Crawford, compromised Valera's interest for the benefit of Clay. Clay was clearly afraid of exposing the secret coaching he had been conducting with Crawford:

> I [Crawford] tried to tell [Clay] that I was willing to correct my testimony. . . . That Moriarty [AUSA] had threatened me again at the lunch's recess [during Crawford's testimony] . . . I figured he [Clay] should have been delighted that I was willing to go back and expose the government not only knowing that my testimony was false but that Moriarty was making me tell a lie in court.

Crawford's Affidavit, App. A-24.

In *Cuyler v. Sullivan*, 446 U.S. 335, 64 L.Ed.2d 33, 100 S.Ct. 1708 (1980), this Court decided that there is no *sua sponte* duty on the part of the court to make inquiry when placed on notice of the mere possibility of a conflict of interest. And unless the court knows or should know that a particular conflict exists, the court has no duty to *sua sponte* inquire.

This Court's decision in *Wood v. Georgia*, 450 U.S. 261, 67 L.Ed.2d 220, 101 S.Ct. 1097 (1981), which Valera believes is determinative of his issue, seemed to change the *Cuyler* proposition that the mere possibility of a conflict of interest imposes no *sua sponte* duty on the part of the court to inquire. In *Wood v. Georgia, supra*, this Court concluded unlike *Cuyler* "the possibility of a conflict of

interest was sufficiently apparent at the time of the [probation] revocation hearing to impose upon the court a duty to inquire further." *Id.* at 272. Closer scrutiny of *Wood v. Georgia*, however, will reveal that it was not the "possibility" of a conflict of interest that triggered the duty of the Court to *sua sponte* make inquiry but the "possibility of a particular conflict" which imposed upon the Court the duty to *sua sponte* make inquiry.

Valera presents that when his attorney revealed to the Court that a key witness for the government indicated to him that his testimony given a few days earlier in Valera's trial may have constituted perjury coupled with statements on the record by Counsel Clay that the call from Crawford caused him concerns about his own legal position, "triggered" the duty on the Court, as in *Wood v. Georgia, supra,* to *sua sponte* conduct an inquiry.

It does not go unnoticed that Valera's counsel appears more concerned with himself than he does with his duty to his client:

> Mr. Clay: This whole thing could backfire on us.
>
> That's why I had concerns about my own legal position when Crawford called me.
>
> My suspicion was . . . that Mr. Crawford had some ulterior motive in mind with regard to me.

App. A-18.

Valera also contends that his counsel's failure to recall Crawford was not a tactical decision, albeit Valera concedes he sat silently while Clay stated:

> Mr. Clay: . . . my client is here hearing this. And we do not desire to step into the issue because it might be misunderstood and they might think we are somehow vouching for Crawford, and we are not.

App. A-19.

Valera claims that after Crawford called Clay desiring to recant his perjured testimony, Valera and Clay argued for almost two hours, (Valera desiring to recall Crawford and Clay not). At the end Valera relented after Clay not being able to objectively convince him, opted for the famous line, "trust me, I know what I'm doing, I'm your lawyer." and unfortunately Valera did. Moreover, Clay instead of disclosing the secret coaching he had been conducting with Crawford, completely deceived the court by omitting it, and attempted to confuse it by making it seem that he did not know why Crawford would call him:

> Mr. Clay: But I consider a contact by a man like Crawford . . . to be a serious matter.
>
> For all I know, Mr. Crawford could be trying to work some type of obstruction of justice and fabrication of evidence against me.

App. A-14.

Clay's paranoid statements are not sustained by Crawford's actions. Clay was presented with a unique problem: a key government witness who he had been secretly coaching is begging to be recalled to the stand, to

correct his previous perjured testimony, alleging that the government coerced same from him:

> Bill [Clay] acted as if I was setting him up. I did not know what to think . . . He was not friendly like he'd been prior to that . . . He kept on cutting me off with I can't advice [sic] you what to do. I didn't know what to do. How could I go to the government and tell them I wanted to change the testimony they'd threatened me with.

Crawford's Affidavit, App. A-25.

Clay was more concerned for his own legal position than for his duty to Valera:

> Mr. Clay: That is why I had concerns about my own position when Crawford called me. My suspicion was not that the Government was involved with Mr. Crawford but that Mr. Crawford had some ulterior motive in mind with regard to me and he was doing his own little mission for his own ulterior motives.

App. 18.

Clay is clearly fearful of Crawford's "ulterior motives" against him, and loses perspective of his duty to Valera:

> Mr. Clay: I made a call to an attorney in Miami, who I know to be an expert in the field of rendering advise [sic] on ethical questions to lawyers handling disciplinary matters, et cetera.

App. A-13.

What possible reason would Clay have, if he did not fear being exposed of committing ethical violations, to consult an attorney, on "ethical questions" at one o'clock in the morning right after Crawford's call:

> Mr. Clay: But I consider a contact by a man like Crawford with his questionable reputation, his questionable credibility to be a serious matter. For all I know Mr. Crawford could be trying to work some type of obstruction of justice and fabrication of evidence against me. And that's another reason why I am reporting it to the court.

App. A-14.

This paranoid and fearful disclosure by Clay should have triggered an alarm to the trial court, but unfortunately, it did not.

This Court in *Kaufman v. United States*, 394 U.S. 217, 22 L.Ed.2d 227, 89 S.Ct. 1068 (1969) citing *Townsend, supra*, held that:

> A federal court must review constitutional claims . . . if . . . the material facts were not adequately developed.

Kaufman, supra, 394 U.S. at 226.

In another case which this Court decided, *Haines v. Kerner*, 404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972) it was held that since it could not be said "with assurance that under the allegations of the pro se complaint" which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief, "he is entitled to an opportunity to offer proof." *Haines, supra,* 404 U.S. at 520-21.

Certainly Valera under the standards of *Haines, supra,* and of the decided law concerning evidentiary hearings is entitled to offer as proof the testimony by Crawford as relating to his false testimony which contributed to Valera's conviction. Crawford sought Valera while Valera was imprisoned, after first trying to recant his testimony by calling Valera's counsel. There is nothing suspect in these as alleged in the government's "response" to Valera's § 2255. Crawford was denied by Valera's counsel, by the prosecution and the Court to recant his perjured testimony.

In direct point, *Blackledge v. Allison,* 431 U.S. 63, 52 L.Ed.2d 136. 97 S.Ct. 1621 (1977), another case decided by this Court in 1977, citing *Machibroda, supra,* it was held that the petitioner is:

> Entitled to careful consideration and plenary processing of [his claim] including full opportunity for presentation of the relevant facts.

After an examination of the brief but revealing disclosure by Clay on February 5, 1987, (App. A-11-19) it is evident that the proceedings against Valera were unfair. A key government witness, who had been threatened and coerced by the government into committing perjury, was knocking on Valera's counsel's door, pleading to be recalled to correct damning testimony which the government had solicited. And no one, not the prosecution, who have a duty to correct false testimony when it is brought to

their attention, nor the court, that knew or should have known that a potential conflict of interest existed, nor Valera's own retained attorney, attempted to protect Valera's interest. Albeit, the Court asked Valera's counsel twice during the hearing if he wanted to recall the witness.

In the recent landmark case involving the same issue, *Wheat v. United States*, 486 U.S. 153, 100 L.Ed.2d 140, 108 S.Ct. 1692 (1988), (the legal and ethical dilemma of representing conflicting interests) Supreme Court Chief Justice Rehnquist, in delivering the opinion for this Court stated:

> [F]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of profession and that legal proceedings appear fair to all who observe them.

Wheat, supra, 486 U.S. at 160.

The paranoia which was manifested by Clay and the government prosecutor concerning that which in ordinary circumstances routinely would be a simple matter of recalling the witness to correct and reconcile his previous testimony is startling, understandably suspect. Terms such as "I made a call to an attorney," App. A-13; "advise on ethical questions to lawyers," App. A-13; "obstruction of justice and fabrication of evidence against me." App. A-14; "my own legal position when Crawford called me," App. A-18; "some ulterior motive in mind with regard to me," App. A-18; and "maybe I am paranoid," App. A-18. It was obvious that the whole story was not being presented to the court. The real conflict which evolved between Clay and witness Crawford which burdened

Clay at the point of determining whether to recall Crawford was the clashing of two factors: (1) Clay's surreptitiously interviewing and coaching of the government witness would be exposed, and (2) the fact that Crawford's testimony would reveal Clay knew Crawford's previously stated testimony constituted perjury.

An appropriate consideration of two important cases this Court decided, *Cuyler, supra,* and *Holloway, supra,* provides the key to when reversal is appropriate after finding of ineffective assistance due to a conflict of interest. In the above two landmark decisions, the latter decided in 1978, and the former in 1980, this Court elaborated upon this subject, finding an important distinction between conflicts timely raised prior to or at trial (*Holloway*) and conflicts not raised until after the trial (*Cuyler*). The facts extrapolated from *Cuyler* reveal it was counsel's – rather than the trial court's – effectiveness. The *Cuyler* Court concluded that the fact that defense counsel in that case had not raised the conflict of interest issue prior to or at trial dictated that a different constitutional test should be applied than that used in the *Holloway* case where counsel had timely raised the issue, placing the trial court on notice.

> In order to establish a violation of the Sixth Amendment defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer performance.

Cuyler, supra, 446 U.S. at 348.

Furthermore, this Court in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), referring to *Cuyler, supra*, noted that reversible ineffective assistance was established in situations where no timely objections were made "only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348, 350.

In *Holloway, supra*, the trial court's failure to adequately respond to counsel's motion for separate counsel was deemed automatically to require reversal of the defendant's conviction (e.g., without the necessity of demonstrating, as in *Cuyler, supra*, that "an actual conflict of interest" existed which "adversely affected his lawyer's performance." *Id.* at 348.

In a subsequent decision, *Wood v. Georgia, supra*, this Court concluded that unlike *Cuyler*, "the possibility of a conflict of interest was sufficiently apparent at the time of the (probation) revocation hearing to impose upon the court a duty to inquire further." *Id.* at 272.

In these, Valera believes the district court was placed on notice of the apparent existence of conflicts of interests reposing in Valera's counsel, which triggered its duty to inquire further and that the failure to do so requires reversal of Valera's conviction.

CONCLUSION

If that one brief hearing before the trial judge, concerning the telephone contact by a government witness to

Valera's counsel, expressing a desire to recant his perjurious testimony could somehow be separated from Valera's criminal proceedings along with the prejudicial consequences, it may fairly be reasoned that Valera's counsel overall performance representing Valera was adequate. But Valera's Sixth Amendment constitutional right to the effective assistance of counsel extends to all critical stages of the proceedings. It was at said hearing that Valera's counsel failed him, due to his intolerable conflicting interests in which he was confronted with choosing between two masters (1) his client, Valera, to whom he owed the greatest duty, and (2) himself because of his surreptitious coaching of the government witness, for several months, which, in fact, he did not desire to be brought to the attention of the court.

It cannot be predicted with definitiveness the precise effect which government witness Crawford's recantation implicating DEA Agent Wong, in the subject criminal enterprise might have had upon the jury in its deliberations. This would be an impossibility, but the probability of the impact is fairly obvious. The jury was already confronted with the fact of one government agent involved in the criminal enterprise and with the addition of another agent, (this one playing an even more significant role because as chief investigator of the criminal enterprise was possessed with much more power and authority) the credibility and reliability of the investigation hung in the balance. It is very probable that it would have opened the door for argument that the entire investigative process was so tainted by the corruption of government agents as to raise a reasonable doubt in the minds of the jury as to the reliability of any witness or

evidence presented in the trial proceedings. At issue was the tainting of the entire government's case, not just the credibility of the testimony of Crawford.

During said hearing, when Valera was in need of the aggressive assistance of counsel to elicit the truth from Crawford as to the corrupt government agent's involvement within the criminal enterprise, to resist and expose the government suborning of perjury in order to convict Valera, such representation was absent. For this brief but critical period Valera's counsel compromised and diluted Valera's defense in violation of his Sixth Amendment right to the effective assistance of counsel and his Fifth Amendment right to due process.

Valera has carried the burden placed upon him of demonstrating that his counsel actively represented conflicting interests which adversely affected his representation of Valera, and that same was aggravated by the facts that the district court though it knew or should have known of the apparent conflicts took no affirmative action to correct same, and that the U.S. Prosecutor knew of the conflict and his use of perjured testimony which was used to convict Valera.

Clearly, Valera is entitled to an evidentiary hearing. Valera has demonstrated, without a doubt, that if his allegations contained in his § 2255 motion are true, he is entitled to a new trial. Title 28 U.S.C. § 2255 requires that a "prompt hearing" be granted when such a motion is filed. This was not a case where the issues raised by Valera were conclusively determined by the motion itself or by the files and records in the trial court. The factual allegations in Valera's § 2255 motion, and corroborated

by the government witness' affidavit, related primarily to purported occurrences outside the courtroom and upon which the record could cast no real light. Nor was the disclosure hearing by Valera's counsel presented in front of the district judge who denied Valera's § 2255 motion, thereby preventing him from making findings of fact from his personal knowledge or recollection of said hearings.

Therefore, Valera is entitled to an evidentiary hearing in order to (1) demonstrate the government's misconduct in the knowing use of perjured testimony, and (2) for the serious and intolerable conflicting interests reposing in Valera's counsel during that brief but crucial hearing.

For the reasons aforementioned, Petitioner respectfully prays that this Honorable Court will grant his application for Writ of Certiorari.

Respectfully submitted,

/s/ Roberto Valera
ROBERTO VALERA, Petitioner
In pro se.
Registration No. 15192-004
PMB 1000 Unit F/E
FCI Tallahassee
Tallahassee, Florida 32301

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IN THE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

NO. 86-4CR-OR-18

ROBERTO VALERA

v

UNITED STATES OF AMERICA

(Filed Dec. 4, 1992)

MOTION TO VACATE, AND SET ASIDE PETITIONER'S SENTENCE AND CONVICTION PURSUANT TO TITLE 28 U.S.C. §2255, FOR VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

AND

MEMORANDUM OF THE LAW AND ARGUMENT

DENIED and SO ORDERED this
28 day of Dec., 1992

/s/ G. Kendall Sharp
G. KENDALL SHARP
United States District Judge

Roberto Valera, pro se
#15192-004 Unit F/E
PMB 1000
Tallahassee FCI
Tallahassee, Florida 32302-1000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2184
Non-Argument Calendar

D. C. Docket Nos. 92-1120-CIV-ORL-18,
86-4-CR-ORL-18

ROBERTO VALERA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(November 22, 1993)

Before HATCHETT, COX, and BLACK, Circuit Judges.

PER CURIAM:

Appellant Roberto Valera appeals from the district court's denial of his 28 U.S.C. § 2255 petition. For the reasons given below, we affirm.

I.

Valera is serving a thirty-year sentence on RICO and Travel Act convictions. His convictions and sentences were affirmed on direct appeal. *United States v. Valera*, 845 F.2d 923 (11th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989).

In his § 2255 motion for post-conviction relief, Valera alleged that he received ineffective assistance of counsel and that the prosecutor deliberately introduced perjured testimony. The district court denied his motion without conducting an evidentiary hearing and without giving any reasons for the denial. On appeal, Valera raises the same issues as he did in the district court and adds that he is entitled to an evidentiary hearing by a different district court judge.

We address first whether the district court should have held an evidentiary hearing and then the merits of Valera's claims. We do not address whether this case should be remanded to a different district court judge because we affirm the district court's order denying Valera's § 2255 motion.

II.

A district court is obliged to hold an evidentiary hearing on a petitioner's § 2255 motion if the motion alleges facts that would, if proven, entitle the petitioner to relief, *Porter v. Wainwright*, 805 F.2d 930, 933 (11th Cir. 1986), *cert. denied*, 482 U.S. 918 (1987), *cert. denied*, 482 U.S. 919 (1987), and if the material facts are inadequately developed, *Futch v. Dugger*, 874 F.2d 1483, 1485 (11th Cir. 1989). As we discuss below, the material facts underlying Valera's two issues have been adequately developed and demonstrate that Valera is not entitled to § 2255 relief.

A.

Valera alleges that his trial counsel was ineffective because he had a conflict of interest and did not recall a certain witness. We review the district court's ruling de novo. *McConico v. Alabama*, 919 F.2d 1543, 1545 (11th Cir. 1990).

To support the claim that his trial counsel had a conflict of interest, Valera must show an actual conflict of interest by pointing to specific instances in the record that show the attorney's interests on behalf of Valera were compromised for the benefit of another party. *Danner v. United States*, 820 F.2d 1166, 1169 (11th Cir. 1987), *cert. denied*, 484 U.S. 1012 (1988). Valera must also demonstrate that the conflict adversely affected the representation he received. *See Ruffin v. Kemp*, 767 F.2d 748, 752 (11th Cir. 1985).

Valera contends that his counsel's friendliness with the prosecutor caused his counsel to refrain from showing that the prosecutor had deliberately introduced false testimony. Valera further contends that his counsel violated ethical rules by coaching the same witness he later refused to recall, allegedly so that the ethical violations could not be exposed. These allegations do not show that his counsel had an actual conflict of interest, and nothing in the record factually supports Valera's claim.

Valera also alleges that his counsel was ineffective because he failed to recall a witness. The witness was Joseph Crawford, a pilot who helped Valera import cocaine from Columbia. Crawford testified as a Government witness. Later in the trial Crawford called Valera's

counsel at home, seeking to change a part [of] his testimony. The morning after Crawford's call, Valera's counsel informed the trial judge and the prosecutor in open court about his conversation with Crawford. The trial judge would have permitted Crawford to be recalled, but Valera's counsel refused to do so because he did not want the jury to think that the defense was vouching for the credibility of a Government witness.

In this Circuit, a decision on whether to call a witness to the stand is a tactical decision that does not support post-conviction relief. *United States v. Rubin*, 433 F.2d 442, 445 (5th Cir. 1970), *cert. denied*, 401 U.S. 945 (1971).[1] Even if it did, Valera must also show that he was prejudiced by his counsel's alleged deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In this case, Crawford had already been impeached by the defense's cross-examination, which exposed Crawford as a convicted drug smuggler who had written and unwritten agreements with the Government, who had lied under oath on several occasions, who was testifying under a grant of immunity, and who had allegedly been pressured by the Government to make statements he considered untrue. In light of this substantial impeachment evidence, Valera cannot show that he was prejudiced by his counsel's decision not to recall Crawford.

We conclude that Valera is not entitled to relief on his ineffective assistance of counsel claim.

---

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

B.

Valera also contends that the prosecutor deliberately introduced Crawford's perjured testimony that Crawford later wanted to change. This Court reviews the knowing use of false testimony under the harmless error standard. *Tejada v. Dugger,* 941 F.2d 1551, 1556 (11th Cir. 1991), *cert. denied,* 112 S. Ct. 1199 (1992).

The Government has a duty not to present or use false testimony, *Brown v. Wainwright,* 785 F.2d 1457, 1464 (11th Cir. 1986). In order to support a motion for collateral relief, however, [a petitioner must show that the evidence is material. *See Giglio v. United States,* 405 U.S. 150 (1972). False testimony is material when there is a reasonable likelihood that it could have affected the jury.] *Tejada,* 941 F.2d at 1556.

Even if Valera could show that the portion of Crawford's testimony Crawford wanted to change was false and knowingly introduced, Valera does not show that the testimony was material and affected the jury. As we discussed above, Crawford's testimony was substantially impeached. Neither the jury's assessment of Crawford's credibility nor the evidence of Valera's participation in the drug smuggling would have been affected by Crawford's allegedly perjured testimony. Thus, that testimony was not material and its introduction was harmless error.

We conclude that Valera is not entitled to relief on this claim.

III.

Accordingly, Valera is not entitled to relief on his § 2255 petition and the district court did not err by not holding an evidentiary hearing. The district court's order is therefore

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2184

ROBERTO VALERA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District
Court for the Middle District of Florida

(Filed Jan. 10, 1994)

BEFORE: HATCHETT, COX and BLACK, Circuit Judges.

The petition for rehearing filed by appellant, Roberto Valera, is denied.

/s/ Susan Black
UNITED STATES
CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-2184
Non-Argument Calendar

D. C. Docket Nos. 92-1120-CIV-ORL-18
and 86-4-CR-ORL-18

ROBERTO VALERA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Nov. 22, 1993)

Before: HATCHETT, COX and BLACK, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order

of the said District Court appealed from in this cause be and the same is hereby AFFIRMED.

Entered: November 22, 1993
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: JAN 27 1994

[p. 4] **PROCEEDINGS**

(CONTINUED FROM VOLUME III)

FEBRUARY 5, 1987 9:00 A.M.

MR. CLAY: YOUR HONOR, MAY I ADDRESS THE COURT ON A MATTER THAT I HAVE DISCUSSED WITH MY CO-COUNSEL, MR. TRAGOS? I BELIEVE THAT I SHOULD MAKE A DISCLOSURE TO THE COURT AND TO THE GOVERMENT [sic].

I HAVE HAD SOME DISCUSSIONS WITH MR. MORIARTY ABOUT THIS ISSUE, BUT A FULL DISCLOSURE TO COME NOW.

AT APPROXIMATELY 10:00 O'CLOCK LAST NIGHT I RECEIVED A PHONE CALL FROM A GOVERNMENT WITNESS, JOSEPH CRAWFORD. CRAWFORD TOLD ME HE WAS CALLING ME BECAUSE HE WAS UNCOMFORTABLE WITH SOMETHING THAT HE HAD TESTIFIED ABOUT IN THE CASE. HE WENT ON TO EXPLAIN THAT HE WAS TAKEN ABACK BY MY QUESTIONS ABOUT AGENT WONG AND THE MAN AT THE CUSTOMS OFFICE THAT MR. MCKENNEY IDENTIFIED OR POINTED OUT TO CRAWFORD AS BEING, BASICALLY, THE PERSON THAT MCKENNEY WAS GROOMING TO TAKE OVER MCKENNEY'S CORRUPTION, ET CETERA.

CRAWFORD TOLD ME LAST NIGHT THAT HE WAS TAKEN ABACK BY MY QUESTION AND THE GOVERNMENT'S [p. 5] QUESTIONS, AND SAID THAT HE WAS NOT COMFORTABLE WITH HIS TESTIMONY.

HE DID NOT – HE TOLD ME HE DIDN'T FEEL THAT WHAT HE TOLD THE JURY WAS ACCURATE, THAT HE DID NOT FEEL THAT HE ACCURATELY ANSWERED MY QUESTIONS WHEN I ASKED HIM ABOUT A DESCRIPTION OF THE PERSON THAT WAS THE INDIVIDUAL PICKED OUT BY MCKENNEY IN THE ROOM.

HE SAYS THAT HE FEELS THAT HE DID NOT ACCURATELY ANSWER MR. MORIARTY'S QUESTIONS WHEN MR. MORIARTY ASKED HIM – AND I FORGET THE PRECISE QUESTION – BUT SOMETHING ALONG THE LINES OF, DID – WAS THAT THE PERSON THAT YOU SAW IN THE ROOM. AND MCKENNEY POINTED OUT AGENT WONG. AND I RECALL CRAWFORD'S TESTIMONY WAS KIND OF EQUIVOCAL ABOUT – IT WAS TENDING TO INDICATE THAT IT WAS NOT AGENT WONG.

I WOULD ASK THAT THE WITNESS BE ABSENT FOR THIS DISCUSSION.

(THEREUPON, SCOTT MCKENNEY LEFT THE COURTROOM.)

MR. CLAY: THANK YOU.

BASICALLY MR. CRAWFORD KIND OF WENT BACK AND FORTH REPEATING THAT HE WASN'T COMFORTABLE WITH WHAT HE SAID; THAT HE WASN'T SURE IT WAS ACCURATE AND HE MIGHT HAVE LEFT A FALSE IMPRESSION IN THE [p. 6] JURY'S MIND BOTH TO MY QUESTIONS AND THE GOVERNMENT'S.

AND HE ASKED ME WHAT TO DO, ASKING FOR SOME GUIDANCE. AND I AM NOT YOUR LAWYER AND I CAN'T ADVISE YOU. YOUR OBLIGATION IS TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH. CONTACT THE PROSECUTOR AND CONTACT THE JUDGE AND DISCUSS IT WITH YOUR LAWYER.

IT IS AN ETHICAL AND MORAL AND A LEGAL ISSUE, AND THAT'S YOURS. AND THAT'S WHAT I SUGGESTED THAT HE DO. YOU CANNOT GO WRONG DOING THOSE THINGS.

HE ASKED ABOUT THE SCHEDULING OF THE TRIAL. AND IF IT WAS HIS POSITION THAT HE WAS INACCURATE IN HIS TESTIMONY, THAT HE HAD BETTER ADDRESS THE ISSUE RIGHT AWAY AND ADDRESS THE THING IN THE MORNING.

AND AFTER HAVING THAT DISCUSSION, I DISCUSSED THIS ISSUE WITH MR. TRAGOS. AND BOTH OF US DECIDED THAT ALTHOUGH THERE SEEMS TO BE NO ETHICAL REASON TO ADVISE THE PARTIES OF THIS, THAT WE FELT IT WAS THE MOST PRUDENT THING TO DO.

I MADE A CALL TO AN ATTORNEY IN MIAMI WHO I KNOW TO BE AN EXPERT IN THE FIELD OF RENDERING ADVISE [sic] ON ETHICAL QUESTIONS TO LAWYERS, HANDLING [p. 7] DISCIPLINARY MATTERS, ET CETERA. AND I DISCUSSED IN GREAT DEAL BASICALLY THE WHOLE CASE SO THAT THE LAWYER UNDERSTOOD THE FACTUAL CONTEXT IN WHICH CRAWFORD CONTACTS ME. THAT LAWYER TOLD ME HE WAS OF THE OPINION THAT THERE

WAS NO NECESSITY ETHICALLY OF ME TO ADVISE THE PARTIES. I TOLD HIM THAT I FELT MORE COMFORTABLE DOING THAT.

WE DISCUSSED CERTAIN IMPACTS UPON THE DEFENDANT VALERA'S TRIAL STRATEGY BY ME DISCLOSING THIS, AND WE BALANCED THINGS. AND THE BOTTOM LINE WAS THAT THIS ATTORNEY AGREED WITH ME THAT I SHOULD MAKE THE DISCLOSURE, ALTHOUGH HE STATED THAT HE FELT THAT I HAD NO ETHICAL OBLIGATION TO DO SO.

THIS IS BASICALLY THE EXTENT OF MY DISCUSSION WITH CRAWFORD, MY CONSIDERATION OF THIS ISSUE, MY CONSULTATION WITH MR. TRAGOS, MY CONSULTATION WITH THE OTHER ATTORNEY. AND IF THE GOVERNMENT WANTS TO, I HAVE NO PROBLEM RELEASING THE ATTORNEY. AND IF THE GOVERNMENT WANTS TO TALK TO HIM ABOUT THE ISSUE, I HAVE NO PROBLEM WAIVING ANY ATTORNEY/CLIENT PRIVILEGE I MAY HAVE WITH HIM.

BUT I CONSIDER A CONTACT BY A MAN LIKE CRAWFORD WITH HIS QUESTIONABLE REPUTATION, HIS QUESTIONABLE CREDABILITY TO BE A SERIOUS MATTER. FOR ALL I KNOW, MR. CRAWFORD COULD BE TRYING TO [p. 8] WORK SOME TYPE OF OBSTRUCTION OF JUSTICE AND FABRICATION OF EVIDENCE AGAINST ME. AND THAT'S ANOTHER REASON WHY I AM REPORTING IT TO THE COURT. AND I LAY IT AT THE COURT AND GOVERNMENT'S DOORSTEP.

THE COURT: THANK YOU, SIR.

MR. MORIARTY: I DON'T SEE WHERE THIS IS AN ISSUE. I THINK MR. CRAWFORD WAS TAKEN ABACK. I HAVEN'T PERSONALLY DISCUSSED THE MATTER WITH HIM.

HE WAS ASKED TO IDENTIFY MICHAEL WONG AS BEING A BAD AGENT. THE UNITED STATES ATTORNEY'S OFFICE THROUGH MR. CLAY'S CONCERN DID NOT SEND MR. CRAWFORD TO SCENT OUT THE OBSTRUCTION OF JUSTICE ON MR. CLAY.

I AM BEMUSED WHY MR. CRAWFORD IS CALLING MR. CLAY. I THINK THE DEFENSE GOT LUCKY THAT THE BAD AGENT, IF IN FACT THERE WAS ONE, LOOKED LIKE MICHAEL WONG WITH WHOM I HAD A CUP OF COFFEE YESTERDAY AFTERNOON. THE GOVERNMENT SEES NO NEED FOR ANY CORRECTIVE ACTION.

THE DEFENSE IS LUCKY AND THEY CAN PURSUE –

THE COURT: IS HE HERE THIS MORNING?

MR. CLAY: I HAVE NOT SEEN HIM. I TOLD HIM – THIS IS THE ONLY THING THAT I DID ADVISE HIM – I SAID, CONTACT THE PROSECUTOR, CONTACT THE JUDGE, [p. 9] CONTACT YOUR LAWYER. AND IF YOU PERSIST IN THE BELIEF THAT THERE HAS BEEN MISLEADING AND INCORRECT TESTIMONY BEFORE THE JURY, THEN ADDRESS IT FIRST THING TOMORROW MORNING WITH YOUR LAWYER IN COURT. THAT'S THE – WHAT I ADVISED HIM TO DO.

IF HE IS NOT HERE, I JUST HAVE TO DRAW THE CONCLUSION THAT HE HAS RESOLVED THE ISSUE IN HIS OWN MIND AND THAT'S THE END OF IT.

THE COURT: EITHER OF YOU WISH THE COURT TO TAKE ANY ACTION IN THE MATTER, PARTICULARLY RELEVANT TO THIS CASE?

MR. MORIARTY: THE GOVERNMENT SEES NO NEED. HE HAS BEEN CALLED INTO THE U.S. ATTORNEY'S OFFICE EVERY DAY BECAUSE HE WAS TOLD HE WAS SUBJECT TO RECALL. HE HAS BEEN CALLING IN AROUND 10:00 OR 11:00. I HAVE HAD NO DISCUSSIONS WITH HIM REGARDING HIS CONCERNS OF HIS TESTIMONY.

MR. CLAY: FOR ALL I KNOW, HE IS TRYING TO RAISE THE ISSUE TO THE U.S. ATTORNEY. ALL I KNOW IS THAT HE DID INDICATE IN EQUIVOCAL FASHION WHAT ACCURATE TESTIMONY WOULD BE CONCERNING –

THE COURT: THE DESCRIPTION OF THAT MAN?

MR. CLAY: THE DESCRIPTION OF THE MAN. AND HE WENT ON TO SAY THAT THE PERSON WAS ORIENTAL; THAT HE HAD TOLD D.E.A. AGENT FAGAN LATER ON IN THE [p. 10] INVESTIGATION. HE DESCRIBED THE MAN AS AN ORIENTAL AMERICAN. AND HE TOLD ME THAT WHEN HE FIRST SAW AGENT WONG IN THIS CASE HIS REACTION WAS THAT HE BELIEVED THAT HE HAD SEEN AGENT WONG BEFORE. AND AS HE STARTED TO THINK

ABOUT IT, HE THOUGH THAT AGENT WONG MAY BE THE PERSON HE SAW IN THE ROOM.

I ASKED HIM ABOUT HIS DEGREE OF CERTAINTY ABOUT THAT STATE OF MIND OR IMPRESSION THAT HE HAD. AND HE BASICALLY DID NOT GIVE ME ANY KIND OF A READING OF THE DEGREE OF HIS CERTAINTY. HE DIDN'T SAY, I AM 90 PERCENT CERTAIN; I AM 10 PERCENT CERTAIN. IT WAS EQUIVOCAL.

THE COURT: DO YOU WANT HIM BACK FOR FURTHER CROSS EXAMINATION?

MR. MORIARTY: THE GOVERNMENT DOESN'T, YOUR HONOR.

THE COURT: DOES THE DEFENSE?

MR. MORIARTY: THEY HAD HIM ON CROSS EXAMINATION. THEY COULD HAVE LED THEM ALL AROUND THE COURTROOM.

THE COURT: I UNDERSTAND THAT. BUT IF THERE IS SOMETHING THAT THEY HAVE LEARNED SINCE THAT TIME, DOES THE DEFENSE WISH HIM BACK FOR FURTHER CROSS EXAMINATION?

MR. CLAY: YOUR HONOR, WE'VE DISCUSSED [p. 11] THIS, MR. TRAGOS, MYSELF; AND OUR CLIENT, MR. VALERA. AND IT'S A TOUGH – IT'S A TOUGH DECISION.

I AM VERY CONCERNED THAT FOR DEFENSE COUNSEL TO RECROSS EXAMINE CRAWFORD ON THIS MIGHT GIVE THE JURY THE IMPRESSION THAT

SOMEHOW WE ARE VOUCHING FOR HIM AS A WITNESS. AND THIS WHOLE THING COULD BACKFIRE ON US. I DON'T WANT TO BE ASSOCIATED WITH CRAWFORD IN ANY WAY THAT THE JURY MIGHT FEEL INDICATES THAT THE DEFENSE IS A BELIEVABLE PERSON ON ANYTHING BECAUSE I DON'T – AND THAT IS WHY I HAD CONCERNS ABOUT MY OWN LEGAL POSITION WHEN CRAWFORD CALLED ME.

MY SUSPICION WAS NOT THAT THE GOVERNMENT WAS INVOLVED WITH MR. CRAWFORD BUT THAT MR. CRAWFORD HAD SOME ULTERIOR MOTIVE IN MIND WITH REGARD TO ME AND HE WAS OUT DOING HIS OWN LITTLE MISSION FOR HIS OWN ULTERIOR MOTIVES. MAYBE I AM PARANOID, BUT WHEN YOU DEAL WITH INDIVIDUALS LIKE CRAWFORD AND MCKENNEY AND MARTIN, I THINK IT IS VERY WISE TO BE ON NOTICE THAT THESE PEOPLE ARE SKILLFUL DECEIVERS. THAT'S WHY I BROUGHT IT UP.

THE COURT: I APPRECIATE YOU RELATING IT.

MR. CLAY: OUR DECISION THAT WE DO NOT WISH TO RECROSS EXAMINE HIM BECAUSE WE DO NOT WANT THE JURY TO HAVE ANY THOUGHT THAT WE ARE IN ANY WAY [p. 12] VOUCHING FOR HIS CREDIBILITY. AND I THINK BECAUSE HE CAME OUT OF SEQUENCE THEY MAY GET THAT IMPRESSION.

IF THE GOVERNMENT WANTS TO DO SOMETHING AS FAR AS ADDITIONAL TESTIMONY – I

THINK THE NAPIER VERSUS ILLINOIS DEALS WITH CORRECTING MISLEADING TESTIMONY. THE MISLEADING TESTIMONY CAME OUT ON REDIRECT EXAMINATION OF MR. CRAWFORD, ACCORDING TO WHAT CRAWFORD TOLD ME.

AGAIN, EVERYTHING HE SAYS IN MY JUDGMENT IS SUSPECT. BUT UNDER NAPIER VERSUS ILLINOIS, I THINK THE GOVERNMENT MUST HAVE THE DUTY TO CORRECT THE MISLEADING TESTIMONY OR THE COURT HAS THAT DUTY. BUT MY DEFENDANT, VALERA, AND MY CLIENT IS HERE HEARING THIS. AND WE DO NOT DESIRE TO STEP INTO THE ISSUE BECAUSE IT MIGHT BE MISUNDERSTOOD AND THEY MAY THINK WE ARE SOMEHOW VOUCHING FOR CRAWFORD, AND WE ARE NOT.

MR. MORIARTY: IF I EVER HAD A DUTY UNDER NAPIER VERSUS ILLINOIS, I DON'T HAVE IT HERE. THE GOVERNMENT WILL NOT RECALL MR. CRAWFORD ON THIS ISSUE.

THE COURT: ALL RIGHT. WELL, MR. MORIARTY – BRING THE JURY IN.

MR. CLAY: YOUR HONOR, ONE OTHER MATTER.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

v.

ROBERTO VALERA

_____/

CASE NO:
86-4-Cr-Orl-18

AFFIDAVIT

BEFORE ME, a person duly authorized to take oaths, this day personally appeared **JOSEPH CRAWFORD** who, after being sworn to oath deposes and says:

I was a government witness in the above-captioned case.

I am 18 years old or older.

I am making the following statements voluntarily out of my own free will:

1. Around June of 1986, after I had just finished serving 39 months in prison and while I was still in a half-way house Private Investigator **Patrick McKenna** contacted me. He told me he worked for a Miami lawyer named **Bill Clay**. He wanted to know if I was willing to talk about the case of **Bobby (Roberto Valera)** in which I was going to be a government witness. I agreed and we talked for about 3 or 4 hours. I met with **McKenna** 4 or 5 more times and mostly he interrogated me about everything I knew about the case and the defendants. He took extensive notes.

2. I also met with **Bill Clay** about four times. Once in Opalaka Airport in Miami. A couple of times In

Orlando and one more time in Miami. These meetings were between the same time period, June of 1986 thru January of 1987. There were also numerous calls by both of them specially by **Bill** to my home up to the week before the trial when **Bill** gave me the name and telephone number of the Omni Hotel where he was going to stay here in Orlando for the trial. **Bill** also took extensive notes of our conversations.

3. During this same time period **Paul Moriarty**, the government's lawyer in **Bobby's** case kept on pressuring me about allegations I'd been making to the DEA about one of its agents being involved in our crime activities. The allegation was that **Scott McKenney**, a custom captain, who had already been convicted in the same case as **Bobby's**, at one time while he was still in Customs, had pointed someone out to me in his office. **Scott** had been thinking of resigning because he thought he was being watched. It was getting too hot for him in Customs. So this one time he pointed out a Chinese-American that was sitting at a desk a few feet away from us. **Scott** said that after he resigned this guy was going to keep on giving us the information we needed for our criminal activities. He introduced me to him and I saw him a couple of times after that.

4. I didn't see this Chinese-American guy until after I was in prison when he replaced agent **Thorton** and came to see me together with agent **Charlie Fagan.** I didn't recognized [sic] him right away. Then **Wong** started harrasing [sic] my wife telling her that he was going to make sure that I stayed in prison for a long time. There was not reason for the harrasment [sic] since I was cooperating. He'd look familiar all along and I started thinking until it dawn on me that

Wong was the same guy **Scott** had shown me. Then, I asked agent **Fagan** if **Wong** had ever worked with **Scott Mckenney** and **Fagan** answered me, it took you long enough to figure it out, **Joe**. That's when I proceeded to tell the DEA that **Wong** was the dirty agent. After all how many Chinese-American law enforcement officers had worked with Scott. It was obvious to anyone who care[d] to investigate it. Eventually I signed an affidavit to that effect.

5. That is the reason that **Moriarty** kept on pressuring me and telling me that if I couldn't prove that **Wong** was dirty that I better not mention it in court. That if I did I would be prosecuted for all the charges that he had been holding over my head. These arguments were very intense, they became screaming matches between us. I would tell him that I couldn't understand how **Scott** and **Wong** had worked together and were buddies and **Wong** was in charge of the investigation. We went at each other about 3 or 4 times. It only strengthen[ed] my conviction that **Wong** was dirty. **Moriarty** would really get bend [sic] out of shape everytime we discussed **Wong**. He acted like **Bobby's** case would collapse if I would say that **Wong** was dirty in court. I just couldn't understand why **Moriarty** wouldn't investigate **Wong**. After all I'd made an affidavit way before **Bobby** ever came into the picture.

6. On the day I was finally called to testify I was sick, I had one of those 24 hour virus. As a matter of fact the **judge** excused me 3 times to go to the men's room because I was sick to my stomach. I remember that **Moriarty** who was asking me questions wasn't too happy with my answers. He mentioned something about impeachment to the **judge**. On the lunch recess **Moriarty**

got to me and once again started threatening me. He reminded me that I was still in the halfway house and that he could send me back today. He went through the whole thing again. I didn't give him a fight this time, I didn't feel up to it, I was very sick. I think he took that as an agreement on my part.

7. **Bill Clay** didn't ask the big question about **Wong**. He just went around and asked if the dirty agent resembled **Wong**. Towards the end of the day **Moriarty** came back and asked me point blank about **Wong** being the dirty agent and I denied it. By this time I didn't have any strength left in me. I was sick and just wanted it to be over with.

8. I realize that I have lied before under oath in court. I know that I am a convicted felon, a criminal. And I realize that **Paul Moriarty** is or was an Assistant Distric[t] Attorney for the government. He's supposed to be an outstanding model of a citizen. I know that it would be extremely difficult for anyone to believe me over him. Therefore, I propose that Mr. **Paul Moriarty** and I, **Joseph Crawford** be given a lie detector to really find out who is telling the truth.

9. When I finished testifying I walked out of the courtroom and saw **Wong**. He was very agitated, pacing back and force. **Bill** had told me he was going to call him as a witness. When **Wong** saw me he just sort of froze.He stared at me and I just kept on walking.

10. When I got home I was still sick and went to bed. Next day I felt better and I started thinking about what had happened. I felt bad, guilty. I began to put everything in perspective and decided I would try to

correct my testimony about **Wong**. I was angry at **Moriarty**, angry at the system and angry at myself. I said to myself the hell with it, if God wants me back in prison so be it. I left it in his hands.

11. The following day I called **Bill Clay** about 9 or 10 at night. I figured it was the logically thing to do. I had been meeting and talking with **Bill** for a long time. Besides **Bill** had gone out of his way trying to help **Bobby** sort of beyond the call of duty. I called him at the Omni Hotel here in Orlando where he was staying. I told **Bill** that I wanted to correct my testimony concerning **Wong**. That I didn't feel right with the answers I'd given in front of the jury. I asked him if there was still time for him to put me on the stand again. **Bill** started telling me that he couldn't tell me what to do that he couldn't advice [sic] me. That I should tell the truth and nothing but the truth. For a moment I thought I was talking to the other lawyer that **Bobby** had (which I never saw or talked to other than in court) But as **Bill** continued giving me the morality trip I realized that it was **Bill**. I tried to tell him that I was willing to correct my testimony, that I had been sick and that **Moriarty** took advantage of that to ask me the big question about **Wong**. That **Moriarty** had threatened me again at the lunch's recess. But **Bill** didn't want to listen or wasn't listening. I couldn't understand why he was acting so differently. He didn't seem happy with my willingness to go back to court. I figured he should have been delighted that I was willing to go back and exposed the government not only knowing that my testimony was false but that **Moriarty** was making me tell a lie in court. **Bill** sounded like I'd never talked to him before. Like he was surprised that I would call him with

something like this. He told me to call my lawyer, to go see the government but that he couldn't do anything.

12. **Bill** acted as if I was setting him up. I did not know what to think. I don't see any other explanation for his behavior that night on the phone. He was not friendly like he'd been prior to that. He sounded distant and business like. He wouldn't let me finish explaining things to him. He kept on cutting me off with I can't advice [sic] you what to do. I didn't know what to do. How could I go to the government and tell them I wanted to change the testimony they'd threatened me with. I thought that maybe **Bill** was selling **Bobby** out, but I remembered how much **Bill** seemed to want to win the case for **Bobby**. I mean all the meetings we had. All the information I gave him. All the discussions we had. He went practically through everything he would be using for **Bobby**. He would tell me the damaging points that I had. He would point out what would be beneficial to **Bobby**. He would suggest that I look at things from other points of view. He would tell me things I didn't know like; the Miami Omni's receipts. He explained that they were different days, that it was a coincidence that it had been the same room but that **Bobby** and his wife had been celebrating their anniversary and that **Scott** and I were given the same rooms two days later. That it was all a big coincidence. He also suggested; don't you think that the reason **Bobby** paid for our room (**Scott** and I) was in gratitude for me signing his log book. He also told me about how important it was to prove that **Bobby** didn't know the other groups. He had this theory about winning the case with it. He explained how he was going to ask me a comparison about basketball and the different groups.

13. I'm not a lawyer but I could see that the way **Bill** was talking and discussing things about the case with me he was taking a risk that I would go to the government with it. That is more of a reason why I was so sure that **Bill** was really trying to help **Bobby** even if he went too far with it telling me or suggesting what would be better for **Bobby**. I didn't have any problems with that because I knew what the government was trying to do. And I knew that I wasn't going to put myself in a position to perjure myself. I was willing to help up to point. I wasn't willing to lie.

14. When I hung up I felt bad for **Bobby** because I realized that he had been screwed. For my part I felt relieved, at least my conscience was clear. I had tried to correct my testimony, I had gone to the person who would had benefited the most He didn't want to do anything about it. In a way I had been the fortunate one since I'm sure **Moriarty** would have tried to indict me if **Bill** would have put me on the stand.

15. A few months later I got **Bobby's** wife's telephone number. I told her to tell **Bobby** about everything that had happened. I told her that if **Bobby** ever needed my statements I would be willing to say them under oath and go to court if necessary. A few months ago **Bobby's** wife called and asked me to do just that since **Bobby** was doing a 2255 motion. And that is why I'm making the statements above.

As I stated earlier I am signing this Affidavit freely and voluntarily. I'm initialing every page.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Joseph Crawford
JOSEPH CRAWFORD

SWORN TO AND SUBSCRIBED before me this 18 day of November, 1991.

/s/ Armando Fuster, Jr.
NOTARY PUBLIC,
State of Florida

My Commission expires 10/28/94

STATUTORY PROVISION INVOLVED

The statutory provision involved is 28 U.S.C. § 2255 which reads as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.